

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Request for Review by)
Unicom, Inc. of Decision of)
Universal Service Administrator)

Docket Nos. 96-45 and 97-21

To: The Commission

**REPLY TO YUKON-KUSKOKWIM HEALTH CORPORATION'S OPPOSITION TO
UNICOM'S PETITION FOR LEAVE TO FILE SUPPLEMENT**

Unicom, Inc. ("Unicom"), by its counsel, hereby replies to "Yukon-Kuskokwim Health Corporation's ["YKHC"] Opposition to Petition for Leave to File Supplement to Petition for Review or, in the Alternative, Comments on Supplement" filed May 6, 2002 ("Opposition").¹ YKHC opposes the acceptance of Unicom's Supplement, filed April 22, 2002, which consisted of a copy of a January 17, 2001, memorandum from the Office of Legal Counsel, U.S. Department of Justice ("DOJ Memo"). YKHC further argues that if the Commission accepts the Supplement that it has no bearing on the applicability of Indian preferences to its request for support under the rural health care program. The YKHC Opposition is without merit.

I. Unicom's Supplement is Relevant.

YKHC contends that the Commission should reject Unicom's Supplement because the DOJ Memo "is not relevant to any question the Commission has authority to address."

¹ On May 1, 2002, General Communication Inc. ("GCI") filed its Response to Unicom's "Petition for Leave to File Supplement to Petition for Review" ("Petition"). Unicom replied to GCI's Response on May 13, 2002 ("Unicom Reply"). As discussed further below, Unicom's Reply is incorporated herein by reference.

Opposition at 2. However, the applicability of Native American preferences required under the Indian Self-Determination and Education Assistance Act (“ISDEAA”) to YKHC is an issue properly before the Commission and wholly within its jurisdiction. The Commission, like all federal agencies, is “required to consider other federal policies, not unique to [its] particular area of administrative expertise, when fulfilling [its] mandate to assure that [its] regulatees operate in the public interest.”² The Commission has long recognized this obligation: “While ... our primary mission is to implement the Communications Act, we believe that, in doing so, it is both necessary and appropriate for us to harmonize our actions with other federal policies and objectives.”³

The Commission’s Indian Policy Statement acknowledges “the principles of tribal sovereignty and self-government and the unique trust relationship between the Indian tribes and the federal government.”⁴ The Commission has stated:

We are mindful that the federal trust doctrine imposes on federal agencies a fiduciary duty to conduct their authority in matters affecting Indian tribes in a manner that protects the interest of the tribes. We are also mindful that federal rules and policies should therefore be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.⁵

² *LaRose v. FCC*, 494 F.2d 1145, 1146 (D.C. Cir. 1974).

³ *Tender Offers and Proxy Contests*, 59 RR 2d 1536, 1540 (1986) (footnote omitted).

⁴ *Federal-State Joint Board on Universal Service: Promoting Deployment and Suscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas (Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making)*, 15 FCC Rcd 12208, 12266 (2000) (citing *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207, released June 23, 2000).

⁵ *Ibid.*

Thus, the Commission has recognized that its implementation of Section 254 of the Communications Act, including the rural health care support program under Section 254(b)(6), must “preserve and advance ... principles of tribal sovereignty, and the unique federal trust relationship between Indian tribes and the federal government.”⁶

These same policies require the Commission to harmonize the Indian preference requirements under the ISDEAA and its application of rural health care program criteria to YKHC’s requests for support. The DOJ Memo is, therefore, directly relevant to the questions the Commission must address in this proceeding.

II. The DOJ Memo Supports Application of Indian Preferences to the Rural Health Care Program.

YKHC, like GCI in its May 1 Response, maintains that the DOJ Memo supports the argument that the ISDEAA is not applicable to the funding support it requests. Unicom’s Reply to GCI generally responds to this argument, and it is therefore incorporated herein by reference. Unicom offers the following additional support in reply to YKHC’s Opposition.

The key issue in the DOJ Memo is its discussion of

statutes that do not expressly provide and do not have implementing regulations that expressly provide that Indians or Indian organizations are among the eligible recipients, and do not expressly provide and do not have implementing regulations that expressly provide that Indians are intended beneficiaries, but support activities that will in fact principally benefit Indians.⁷

As applied to the rural health care program, the Commission has recognized that Indians are intended beneficiaries.⁸ Moreover, as a matter of fact, in Alaska the rural health care program principally benefits Indians through tribal organizations such as YKHC.

⁶ *Ibid.*, at 12265.

⁷ DOJ Memo at 5.

⁸ See Unicom Reply at 2-3.

YKHC is a “tribal organization” as defined in the ISDEAA.⁹ In addition, the health care program that YKHC operates -- and for which it requests financial support from USAC and the Commission -- is primarily funded by the Indian Health Service through the Alaska Tribal Health Compact (“ATHC”) for the benefit of Native Americans. The ATHC is a self-governance agreement between the Secretary of Health and Human Services and Indian tribes and consortia of tribes in Alaska.¹⁰ The stated purposes of the ATHC include, in part:

(b) ... enable the signatory Tribes and the Co-Signers to re-design health programs, activities, functions, and services of the Indian Health Service

(c) ... transfer to signatory Tribes, acting individually or collectively, and the ANTHC [Alaska Native Tribal Health Consortium] the responsibility for the programs, activities, functions and services of the Indian Health Service allows signatory Tribes, acting individually or collectively, and the ANTHC to exercise meaningful authority to plan, conduct, and administer those programs and services to meet the health care needs of the Alaska Native Tribes.¹¹

Thus, the benefits that accrue to Native Americans under the funding requests at issue are not simply due to their residence in rural areas. In the case of YKHC and other Alaskan tribal organizations like it, the program benefits Indians principally, if not exclusively, because it is funded by the Indian Health Service and is operated expressly by and for the benefit of Indians.

⁹ 25 U.S.C. Section 450b(1). YKHC is comprised of a consortium of 56 federally recognized tribal villages.

¹⁰ A copy of the ATHC, Amended and Restated October 1, 1998, is Exhibit 1 to the February 16, 2001 letter from William K. Keane and Brian D. Robinson, on behalf of Unicom, to Mr. Mel Blackwell, Vice President, External Communications and Rural Health Care Division, Universal Service Administrative Company.

¹¹ ATHC, Amended and Restated October 1, 1998, at pages 9-10. Subsequent to enactment of Title V of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. Section 458aaa (2001), making permanent the tribal self-governance program of the Indian Health Service, the ATHC was amended to reflect these changes without materially altering the quoted ATHC purposes.

YKHC points to the Department of Agriculture (“Agriculture”) programs cited in the DOJ Memo as illustrative of programs “that principally benefit Indians because of their status as Indians,” and that “gave direct support to Indians because of their membership in a tribe or because they live on Indian reservations.” Opposition at 8. This is equally true of rural health care support in Alaska, and particularly YKHC’s participation as a tribal organization.¹²

YKHC points to no elements of the Agriculture programs that would differentiate them from the rural health care program. The cited Agriculture programs (the Federal Extension Service and the Food Stamp Act) are of general applicability as set forth in their authorizing statutes and implementing regulations, but in each case the Department of Agriculture made grants that in fact benefited Indians, as would a grant of YKHC’s instant request for support.

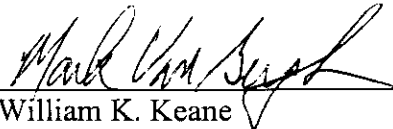
Put another way, the Commission statements discussed herein and in Unicom’s Reply provide even more explicit recognition that a grant of YKHC’s request for support “will in fact principally benefit Indians” than did the Agriculture programs referenced in the DOJ Memo.

For the foregoing reasons, and those set forth in Unicom’s Reply and its previous filings, Native American preferences are applicable to YKHC’s participation in the rural health care program.

¹² Indeed, much of rural Alaska is treated as a “reservation” for purposes of determining eligibility for Native American programs. *See Morton v. Ruiz*, 415 U.S. 199 (1973); *see also* 25 C.F.R. Section 20.100 (defining “reservation” for purposes of Bureau of Indian Affairs Social Service programs as any federally recognized Indian tribe’s reservation ... including Alaska Native regions established under the Alaska Native Claims Settlement Act (85 Stat. 688)).

Respectfully submitted,

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May 16, 2002

CERTIFICATE OF SERVICE

I, Yvette Morgan, hereby certify that the foregoing "Reply to Response of General Communication Inc." was served this 16th day of May, 2002, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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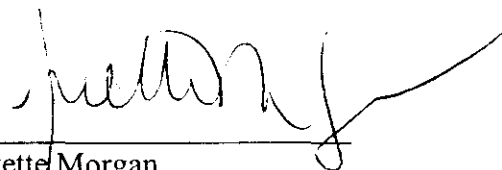
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